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U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Lee H. Hamilton
Chairman
Permanent Select Committee on
Intelligence
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This proffers the views of the Department of Justice concerning H.R. 2994, a bill to amend the National Security Act of 1947. H.R. 2994 would establish by law procedures for the classification and declassification of sensitive national security information, require protection of such information in the three branches of government and in industry, and provide criminal penalties for unauthorized disclosure of classified information. This bill is the latest of several proposals introduced during the last few Congresses to accomplish these objectives. The Department of Justice has consistently opposed such bills, primarily because enactment of a statutory system for classification may hamper the President's flexibility to protect information that might damage the national security. The Department also opposes enactment of a "leaks" statute until high-level review within the Administration of the issues raised has been conducted and the concomitant drafting of a bill that we believe will be fair and enforceable.

First, Title V of H.R. 2994 differs from the previous bills in several respects. It appears to have been drafted with more sensitivity to possible separation of powers implications. The substantive components of the classification scheme are far less detailed and complicated, and recognize the President's primary role in determining when and how to classify information. For example, the President may effectively designate any Executive Branch official to have original classification authority (sec. 502(b)(1)). He may also consider for classification, in addition to a list of separate subjects, "other categories of information that are related to the national security and that require protection against unauthorized disclosures" (sec. 502(c)(1)(J). Rather than impose any strict deadlines, the bill would provide that information is to be classified

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"as long as required by national security considerations" (sec. 502(c)(3)). Requests for declassification review are to be made "[i]n accordance with procedures established by the President" (sec. 502(d)(3) & (4). Finally, the bill contains an express savings provision stating that "[n]othing in this title shall be construed to limit or preclude the President of the United States from carrying out his responsibilities under article II, section 2 of the Constitution of the United States." Given the express recognition of the President's constitutional authority, and the deference paid to the President's discretion in the substantive provisions of the bill, we do not object to H.R. 2994 on separation of powers grounds.

We do, however, oppose the bill on policy grounds. Obviously any classification scheme imposed by statute would, at a minimum, complicate the protection of sensitive national security information, and could limit the President's flexibility to some degree. Moreover, enactment of this statute would set a precedent for more restrictive legislation in the future. As a matter of policy, the Executive Branch is far better equipped than Congress to establish and monitor a system for the classification and declassification of national security information.

Second, the provisions in Title VII of the bill governing the unauthorized disclosure of classified information appear on their face to be less complicated than prior proposals. This Department supports the concept of a "leaks" statute in principle, but only if severed from proposals to establish a statutory classification system. Nonetheless, significant questions remain. No detailed study of the effect of such a statute has been completed within the Administration. In addition, the bill would require the Attorney General to "certify", prior to commencing a prosecution, that the information in question was "lawfully classified" at the time of disclosure (sec. 702(b)). This certification would be "binding, as a matter of fact, upon any court in which such prosecution may be brought." The Department opposes provisions that would make the determination whether the information is lawfully classified a matter of law to be determined by the court, because of concerns about possible Sixth Amendment right to trial by jury challenges. It does not seem to us that a provision requiring the Attorney General to certify the lawfulness of the classification, and making that certification conclusive as a matter of fact, cures that defect. Whether certification is characterized as a matter of law or fact, the jury would be prevented from deciding factual issues relevant to a key element of the crime -- i.e., that the information was lawfully classified. See generally United States v. Walker, 677 F.2d 1014 (4th Cir. 1982); United States v. Austin, 462 F.2d 724 (10th Cir. 1972).

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Title VII also raises a number of additional issues, such as whether the penalties are consistent with those set forth in existing unauthorized disclosure statutes and whether the bill should apply to former employees or contract employees who have authorized access to classified information.

Finally, the term "officer or employee of the United States" should be defined to clarify the precise reach of this provision and, for example, leave no doubt as to whether Congressional staff members are included. Otherwise, the definitions of "officer" and "employee" in 5 U.S.C. § 2104 and 2105 may be presumed applicable. This would mean that a Congressional employee who is not appointed to the Civil Service and who provides information to another similar Congressional employee, both having authorized access, would commit a violation because neither would be an officer or employee of the United States. These ambiguities illustrate the difficulties with a complex statute.

For all of these reasons, the Department of Justice cannot support enactment of H.R. 2994.

The Office of Management and Budget advises that from the standpoint of the Administration's program, there is no objection to submission of this report.

Sincerely,

John R. Bolton
Assistant Attorney General

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